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Louisiana Bicentenary: A Fusion of Legal Cultures, 1803-2003
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Capitant Lecture

James L. Dennis

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Honorable James L. Dennis[*]

I. INTRODUCTION: THE ROLE OF THE LOUISIANA JUDGE

In commemoration of Louisiana's fusion of legal cultures, I will discuss briefly how the integration of those cultures shapes, affects, and challenges Louisiana courts. As might have been predicted, given Louisiana's Spanish and French heritage and its national union with Anglo-American sister states, Louisiana became a mixed jurisdiction, which has received basic characteristics from both civil and common law.

With the transfer of sovereignty over the Louisiana territory by France to the United States two hundred years ago, the United States Constitution and federal laws became automatically supreme, bringing with them admiralty, bankruptcy, copyright, patent, and other federal statutes.[1] But through two statutes in 1803 and 1804, Congress expressly retained the existing French and Spanish laws in all other areas, with the exception of introducing the writ of habeas corpus and trial by jury.[2] By preserving some aspects of Louisiana's civilian heritage, while introducing some common law concepts, the federal government left the new territory the complex challenge of integrating its French and Spanish legal origins into a union whose legal roots were firmly based in English common law.

At first it appeared Louisiana would simply convert to a common law system, for in 1805, the Legislative Council of the Territory of Orleans (which comprised the present State of Louisiana) enacted a system of written pleading similar to the common law of New York and a general criminal statute in conformity with the common law of England.[3] But the French-speaking and French-trained lawyers, especially in the city of New Orleans, resisted efforts by the Territorial Governor, W. C. C. Claiborne, and the common-law trained immigrants, to implant further substantive or procedural common law.[4] In 1808, the Territorial Legislature adopted a Digest

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1. Gordon Ireland, *Louisiana's Legal System Reappraised*, 11 Tul L. Rev. 585, 586-87 (1937).
2. *Id.*
3. *Id.* at 587.
4. *Id.*

of the Civil Laws then in force, which was a compilation of laws based on one of the *projets* of the French Civil Code, as well as many provisions of the Spanish law of Louisiana.[5] Subsequently, the Legislature approved the Civil Code of 1825, which was based in large part on the French Civil Code, with adaptations derived from the works of Pothier and Toullier, as well as Spanish legal principles.[6] Finally, in 1870, a revised Civil Code was adopted, following substantially the prior Code, but eliminating all articles relating to slavery.[7]

Despite the adoption of the Civil Code that comprises the private law, the influence of the common law increased in areas of the law where civilian thought had not been legislatively established. A code of commerce was prepared but the project was rejected by the Legislature.[8] Instead, the problems of trade between Louisiana and other states were resolved jurisprudentially under the common law standards of mercantile law and by the adoption of various Uniform Acts.[9] Although the merchant community at first opposed the reception of the law merchant of the United States, eventually they were won over by the economic benefits of conforming to nationwide commercial usages.[10]

Moreover, the Digest and Codes have each empowered judges to fill gaps in the Code, thereby recognizing that the Code is not a complete legal instrument.[11] The Digest, in its Article 21, declared: In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably an appeal is to be made to natural law and reason, or received usages, where positive law is silent.[12]The substance of Article 21 was retained in each of the Civil Codes including the present revised Code. Perhaps because of this provision, the Louisiana courts early on developed the practice of borrowing judicial solutions from the common law, especially in the area of torts, as well as the custom of citing and relying on judicial precedents.[13]

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5. *Id.* at 588-89.

6. *Id.* at 589.

7. *Id.* at 590; A. N. Yiannopoulos, *Requiem for a Civil Code: A Commemorative Essay* (Oct. 2002) (manuscript on file with author).

8. Vernon V. Palmer & Matthew Sheynes, *Louisiana, in* Mixed Jurisdictions Worldwide: The Third Legal Family 257, 293-94 (Vernon V. Palmer ed., 2001).

9. *Id.* at 294-95.

10. *Id.* at 299.

11. Symeon C. Symeonides, *The Louisiana Judge: Judge, Statesman, Politician, in* Louisiana: Microcosm of a Mixed Jurisdiction 89, 93 (Vernon V. Palmer ed., 1999).

12. Digest of the Civil Laws Now in Force in the Territory of Orleans, Art. 21 (1808).

13. *See* Ireland, *supra* note 1, at 591, 594.

Nevertheless, our Civil Code endures and generally governs the all important area of Louisiana's private law, including the law of persons, family, property, successions, obligations, offenses and quasi-offenses, matrimonial regimes, leases, sales, privileges, mortgages, and prescription.[14] The 1870 Civil Code has now been revised with the hope that it will be an authoritative statement of the civilian tradition of the state within the scheme of a modern, scientific, comprehensive organization. Thus, the tradition of codified laws is firmly established in Louisiana.[15]

Because of this mixed legal heritage, the role of judges in Louisiana is unique, different from both their civilian and common law counterparts. Dean and Professor Symeonides, in speaking on how Louisiana judges have interacted with their mixed legal system, observed:From day one, the Louisiana judge was expected to undertake, and in any event asserted, a much more active role in the shaping of the law and a much more prominent role in the state's governance than his French counterpart. This was particularly true during the formative years of the Louisiana legal system and remains largely true today.[16]In most respects, its judges behave and look like common law judges, but when they decide cases under the Louisiana Civil Code they are expected to adhere to the discipline of civil law jurists. In some respects, even when they consider cases outside the Code, they are still influenced by civil law traditions.

Due to their cross-training, Louisiana judges are knowledgeable in both civil and common law and are capable of operating with ease in both systems.[17] There is a learning curve in this judicial switch-hitting program, however, that can throw a judge off in writing or interpreting an appellate opinion. Although they understand well how precedents, *ratio decidendi*, and holdings work in the common law, Louisiana judges, despite considerable effort over the years, still do not seem to understand fully whether or how their common law style opinions should be treated in later cases to be decided under the

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14. *Id.* at 595-96.

15. As Professor Yiannopoulos has said:

> Louisiana has been, and most probably will continue to be, a mixed jurisdiction. This is a blessing rather than a handicap, because Louisiana has a choice in the course of her future legal development and in the pursuit of justice for all her citizens. Not necessarily at the expense of certainty, Louisiana has always enjoyed, and will continue to enjoy, flexibility in the administration of civil justice.

Yiannopoulos, *supra* note 7, at 17-18.

16. Symeonides, *supra* note 11, at 89.

17. Jean-Louis Baudouin, *The Impact of the Common Law on the Civilian Systems of Louisiana and Quebec, in* The Role of Judicial Decisions and Doctrine in Civil Law and in Mixed Jurisdictions 3 (Joseph Dainow ed., 1974).

Civil Code.[18] Jurists agree that jurisprudence must have a different role and impact on the civil and common law sides of our legal system. But there has not yet been sufficient articulation and agreement upon a theory or methodology that a judge should use to determine how influential a previously decided case ought to be in deciding a subsequent case under the Civil Code.

I have previously attempted to outline a theory of how the decisions of our appellate courts that interpret and apply the Civil Code should be used in subsequent civil law cases.[19] The basic idea is that a previously decided case under the Civil Code, even though contained in a common-law type opinion, means something different than the case would in a common law system because under civil law methodology, the Civil Code, not judicial precedent, is the primary source of law.

In the common law, judicial precedent plays a leading role and serves as both a source of law and an example of a prior judge's methodology in reasoning from the case-law materials.[20] It is "a process . . . in which a proposition descriptive of the first case is made into a rule of law and then applied to a similar situation."[21] Under the common law theory of precedent, courts in the controversy before it have much flexibility in deciding which previous case is sufficiently similar to be chosen as a precedent and in formulating a rule based upon the material facts of the precedent case. Paradoxically, however, in some common law systems, especially the federal court system, a case interpreting a statute enjoys a super-strong *stare decisis* effect or presumption of correctness and will be reexamined and overruled only under the most compelling circumstances.[22]

But under civil law methodology, judicial precedent plays only a supporting role. The Civil Code is the primary source of law, and precedent is only an example of a prior judge's interpretation and

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18. *Id.* at 10.

19. *See generally* James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 La. L. Rev. 1 (1993).

20. *Id.* at 3. William Eskridge states that common law courts in the United States consider *stare decisis* "more a rule of thumb than an iron-fisted command," at least in the area of common law and constitutional precedents. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 Geo. L.J. 1361, 1361 (1988).

21. Edward H. Levi, An Introduction to Legal Reasoning 1 (1951).

22. Eskridge, *supra* note 20, at 1362-63. Eskridge argues that while the Supreme Court retains this super-strong presumption of correctness for statutory precedents, it has departed from the strict *stare decisis* rule where the previous opinion did not consider the issue thoroughly, where Congress left statutory development to the courts, or where precedent has not created a great deal of public and private reliance. *Id.* at 1368.

application of legislated law.[23] For a case based on the Civil Code to serve as a good example or precedent it must illustrate that the judge followed sound civil law methodology when he or she interpreted the Code and applied it to the case. Thus, a subsequent court is free to evaluate the precedent and give it more or less persuasive value according to the quality of the prior court's performance within the context of the Civil Code.

Given our hybrid legal system, Louisiana judges must always be alert to whether, in a particular case, they are operating as civil or common law jurists. A judge who mistakenly treats a Civil Code case like a common law precedent by extracting a *ratione decidendi* from its material facts, or by distinguishing or drawing an analogy from such a *ratione*, probably will seriously misuse the Code provisions that should govern the case. If a judge blindly follows a previous civil law interpretation without analyzing its application of the Code, the judge may perpetuate errors damaging to the civil law system. Even if the facts of the prior case are identical to the present case, the judge must still ascertain whether the decision was properly supported by the applicable Code provisions before following it. By the same token, civil law opinion writers should take care to show clearly their interpretation and application of the code provisions upon which their decisions are based.

Fortunately, Louisiana judges have available to them excellent doctrinal writings in many areas of the Civil Code to help prevent such errors. Woefully, however, they do not have enough to keep them from going astray in uncharted civil law regions. Because the vast majority of our judges are not bilingual, they cannot readily access untranslated foreign civil law materials.[24]

On the common law side of Louisiana's hybrid system, I cannot think of any particular difficulty our judges have had. Perhaps some common law scholars would argue that because of our civil law influence we do not adhere to precedent sufficiently, or that, in statutory cases, unlike some common law judges, we do not treat a statutory precedent as becoming part of the statute, but tend to reexamine the legislation anew in each case. However, I think the Louisiana trial and intermediate appellate courts do consistently follow state Supreme Court precedent, not because of any formal notion of *stare decisis*, but out of respect for each court's role in the system.[25] Of course, the Louisiana Supreme Court has at times overruled previous decisions as erroneous interpretations of the

23. *See* Dennis, *supra* note 19, at 3 & n.7.

24. Palmer & Sheynes, *supra* note 8, at 322-26.

25. *See also id.* at 284-85 (discussing reluctance of lower courts in Louisiana to depart from decisions of the Louisiana Supreme Court even though not formally bound by *stare decisis*).

Civil Code, which is what the court should do once it realizes that its previous jurisprudence is inconsistent with correct interpretation of the legislated law.[26]

II. CIVIL LAW AND THE FEDERAL COURTS: AN OVERVIEW

Federal judges must follow state law, including the Louisiana Civil Code, because "the substantive law to be applied by the federal courts in any case is state law, except when the matter before the court is governed by the United States Constitution, an act of Congress, a treaty, international law, the domestic law of another country, or, in special circumstances, federal common law."[27] The reason is both statutory and constitutional. Section 34 of the Judiciary Act of 1789 provides that:The laws of the several states, except where the Constitution, treaties [or statutes of the United States] shall otherwise require or provide, shall be regarded as rules of decision in [trials at common law] in the courts of the United States in cases where they apply.[28]In 1938, the Supreme Court decided *Erie Railroad Co. v. Tompkins*,[29] which added a constitutional component to the statutory command of the Judiciary Act. Because the courts can have no greater law-making authority than Congress, and Congress's law-making authority is constrained by the enumerated powers of Article I, the structure of the Constitution and separation of powers limits the ability of federal courts to create federal common law. Rather, state law must provide the rules of decision except where there is a federal interest requiring application of federal law.[30] This is commonly, although loosely, known as the "*Erie* doctrine."[31]

Under the *Erie* doctrine state law is applied most often and pervasively when the opposing litigants are of diverse citizenship. But the *Erie* doctrine does not apply only in diversity cases. Thus, state law has been applied to determine the character of property for federal estate tax purposes, in pendent, now supplemental, jurisdiction cases, in federal condemnation actions to determine what property interests are compensable, and in a federal bankruptcy action to determine the debtor's property rights, to name just a few issues governed by state law.[32]

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26. *Id.* at 284.
27. 19 Charles Alan Wright et al., Federal Practice and Procedure: Jurisdiction § 4501, at 2 (2d ed. 1996).
28. 28 U.S.C. § 1652 (1994).
29. 304 U.S. 64, 54 S. Ct. 817 (1938).
30. 19 Wright et al., *supra* note 27, § 4520, at 636.
31. *Id.* § 4501, at 2.
32. *Id.* § 4520, at 639-40.

Because of the methodology required of federal judges in determining state law, even civil law trained federal judges are apt to have greater difficulty than a Louisiana state judge in conscientiously interpreting and applying the Louisiana Civil Code. The United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") has said that "[i]n order to determine state law, federal courts look to final decisions of the highest court of the state[, and w]hen there is no ruling by the state's highest court, it is the duty of the federal court to determine as best it can, what the highest court of the state would decide."[33] Generally, in determining what a state's highest court would hold with respect to a particular issue, federal courts of appeals "may consider relevant state precedent, analogous decisions, considered dicta, scholarly works and any other reliable data."[34] Although this approach does not prohibit reasoning directly from the Code and using scholarly works, in practice federal judges rely far more heavily upon what they consider to be relevant and analogous state court precedents. The use of common law methodology is made more prevalent because federal courts of appeals hearing appeals from Louisiana federal district courts use three-judge hearing panels and their dockets are assigned randomly. Many panels have no Louisiana judges, and most have no more than one. As a result, common-law trained judges participate or preponderate in civil code cases.[35]

Even for the federal judge inclined to use civilian methodology in federal courts, it is a difficult road to tread, because the panel usually will receive little help from the advocates. Our distinguished late colleague Alvin Rubin once wrote that in his twenty-one years on the federal bench he never saw one brief refer to the difference between *jurisprudence constante* and *stare decisis*, or even one different in approach or style from that used in common law cases.[36] Indeed, in my experience on the Louisiana Supreme Court I found that briefs on Civil Code issues in state court suffer from the same deficiencies, perhaps due to the prevalence of common law techniques in legal education and the ease with which reporters and research systems make analogous cases available to lawyers. When the judges using those briefs are common law trained and not particularly familiar with civilian methodology, as often is the case on the Fifth Circuit, the lack of argument by the attorneys based on civil law techniques may be fatal to the use of civilian analysis by the court.

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33. Hollis v. Hill, 232 F.3d 460, 465 (5th Cir. 2000) (quoting Transcon. Gas Pipeline Corp. v. Transp. Ins. Co., 953 F.2d 985,988 (5th Cir. 1992)).

34. *Id.* (quoting McCallum v. Rosen's Diversified Inc., 153 F.3d 701, 703 (8th Cir. 1998)).

35. Alvin B. Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad*, 48 La. L. Rev. 1369, 1379 (1988).

36. *Id.* at 1377-78.

I have time to describe only two examples, out of many, in which the differences between the Louisiana mixed system and the federal common law system created difficulties for federal judges applying Louisiana law. They show some of the pitfalls facing a federal judge attempting to ascertain the meaning of Louisiana law.

III. INTERPRETIVE LEGISLATION

In the first example, *In re Orso*,[37] two Louisiana law concepts were sources of the federal court's difficulty in interpreting state law. As you may know, the Louisiana Supreme Court has long recognized as part of its civil law tradition that the legislature can enact interpretive legislation.[38] That court has explained that "interpretive legislation does not create new rules, but merely establishes the meaning that the interpreted statute had from the time of its enactment. It is the original statute, not the interpretive one, that establishes rights and duties."[39] The law of Louisiana also establishes an exemption from seizure by creditors for the proceeds and benefits of annuity contracts.[40] Federal bankruptcy law authorizes persons who take bankruptcy in Louisiana to make use of that state law exemption in bankruptcy.[41]

Paul William Orso suffered serious injuries in an automobile accident which rendered him mentally retarded.[42] Suit was filed on his behalf and, ultimately, a structured tort settlement was entered under which the defendants purchased annuities that would pay Orso certain sums monthly for his lifetime.[43] After several years during which Orso demonstrated his inability to handle his affairs and timely pay his debts, his mother had him interdicted and, acting as his curatrix, filed for bankruptcy in his behalf.[44] A claim was made for him under the bankruptcy code and Louisiana law to exempt his annuity benefits from his creditors' claims in bankruptcy.[45] The

37. 214 F.3d 637 (5th Cir. 2000) (*Orso I*).

38. Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331, 1338 (La. 1978).

39. *Id.* at 1338-39.

40. La. R.S. 22:647(B) (2001) ("The lawful beneficiary . . . or payee . . . of an annuity contract . . . shall be entitled to the proceeds and avails of the contract against the creditors and representatives of the annuitant . . . and such proceeds and avails shall also be exempt from all liability for any debt of such beneficiary, payee . . . existing at the time the proceeds or avails are made available for his own use . . . .").

41. 11 U.S.C. § 522(d) (1994).

42. *See* In re Orso (*Orso II*), 283 F.3d 686, 689 (5th Cir. 2002) (en banc).

43. *Id.* at 689-90.

44. *Id.* at 690.

45. *Id.*

Trustee in bankruptcy did not oppose the exemption but an objection was filed by Orso's principal creditor, his former wife, whom he owed a substantial amount in accrued alimony.[46] The bankruptcy court upheld the exemption and the district court affirmed.[47]

After the filing of Orso's bankruptcy petition, but before the federal court of appeals heard the creditors' appeal, the Louisiana Legislature, in an act that it expressly characterized as interpretive, provided that an "annuity contract" includes any contract that states on its face or anywhere within its terms that it is an annuity.[48] This legislative act was significant because much earlier, in 1987, in *Young v. Adler*,[49] the Fifth Circuit had held that a structured settlement entered by an attorney for the payment of his fees was not an annuity under Louisiana law for which he could claim an exemption. Thus, the Louisiana legislature essentially told the Fifth Circuit that its interpretation of the annuity statute was wrong.

In the appeal in Orso's case, the majority of the three-judge panel either misunderstood or refused to recognize the power of the Louisiana legislature to enact interpretive legislation, although the matter had been well-settled by numerous Fifth Circuit and Louisiana Supreme Court cases.[50] Treating the interpretive act as merely a new law having retroactive effect, the majority held that federal law required it to apply the state law in effect at the time the debtor filed his petition.[51] The panel majority drew an analogy from a previous case in which the Fifth Circuit refused to allow a retroactive amendment to the Texas exemption list labeled retroactive to govern a bankruptcy petition filed prior to the date of the amendment.[52] The majority concluded that the Louisiana interpretative act had no effect, and that according to strict *stare decisis* the case was governed by the prior decision in *Young v. Adler*.[53] Therefore, the district court's decision was reversed and remanded with instructions to include Orso's annuities in the property of his estate.

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46. *Id.*
47. *Id.*
48. 1999 La. Acts No. 63.
49. 806 F.2d 1303 (5th Cir. 1987).
50. *See* Pierce v. Hobart Corp., 939 F.2d 1305, 1308-09 (5th Cir. 1991) (quoting Winstead v. Ed's Live Catfish & Seafood, 554 So. 2d 1237, 1242 (La. App. 1989)); Harrison v. Otis Elevator Co., 935 F.2d 714, 719 (5th Cir. 1991); Louisiana World Exposition v. Fed. Ins. Co., 858 F.2d 233, 244-45 (5th Cir. 1988); Laubie v. Sonesta Int'l Hotel Corp., 752 F.2d 165, 167-68 (5th Cir. 1985); Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331, 1338 (La. 1978).
51. *Orso I*, 214 F.3d 637, 639-40 (5th Cir. 2000).
52. *Id.*
53. *Id.* at 641 n.5.

However, a majority of the judges in active service of the Fifth Circuit voted to rehear the case *en banc*.[54] Disagreeing with the panel, the *en banc* court affirmed the bankruptcy and district courts' conclusion that the annuity payments were exempt from seizure for two reasons: Orso's annuity was exempt under the plain meaning of the Louisiana law both before and after the interpretive amendment.[55] Therefore, the court overruled *Young v. Adler*, finding it inconsistent with the Louisiana statute.[56] Moreover, the *en banc* court also ruled that the panel majority had erred in not giving effect to the Louisiana interpretative act; that act had not changed the law retroactively; it had merely clarified what the exemption law had always meant.[57] Disregarding the Act was akin to disregarding a Louisiana Supreme Court opinion interpreting the annuity provision post-*Young*.[58]

Orso points to a pitfall that a federal court may face in attempting to "guess" at Louisiana law: as a common law court it may be inclined to resolve open legal questions only by analogy to previous decisions, in disregard of Louisiana legislation and the civil law tradition. But where those decisions are from outside of Louisiana, and rely on common law precepts, doing so will result in a decision not predictive of the Louisiana Supreme Court's interpretation, and therefore not true to *Erie*. The federal courts' interpretative journey with the exemption law made this mistake twice, first, in *Young*, by relying on a Pennsylvania case to override the unambiguous textual command from the legislature that all annuities are exempt from seizure by the debtor's creditors, and again, by the *Orso* panel majority, in equating a Louisiana interpretative act with a Texas substantive amendment that changed the law retroactively.

In fairness to the Fifth Circuit, however, other panels have been faithful to the notion that a federal court applying Louisiana law needs to use civilian methodology. For example, in *Songbyrd v. Bearsville Records, Inc.*, the panel explicitly stated that a federal court making an *Erie* guess on Louisiana civil law determinations had to view the Code as supreme, and opinions interpreting the Code as mere persuasive authority unless and until those opinions reached the level of *jurisprudence constante*.[59] That panel went on to use the text of the Code, Professor Yiannopoulos' civil law treatise, and a 50-year-old Louisiana Supreme Court decision to reach an alternative

54. In re Orso, 242 F.3d 534 (5th Cir. 2001).

55. *Orso II*, 283 F.3d at 693. The *en banc* court can, of course, overrule circuit precedent absent any further legislative expression, and this section of the opinion is best understood as so doing.

56. *Id.* at 694.

57. *Id.* at 696.

58. *Id.*

59. 104 F.3d 773, 779 (5th Cir. 1997).

interpretation of a Code article to that taken in some intermediate state appellate decisions, noting that the position of the state appeals courts had not arisen to the level of *jurisprudence constante*.[60] To make better *Erie* guesses, the sensitivity of the *Songbyrd* panel to civilian methodology should be emulated by all other panels of the Fifth Circuit.

Another pitfall, however, is that a federal court, with its strong *stare decisis* principles, may be reluctant to disregard its own predictive precedents absent a pronouncement from the highest state court that its interpretation is wrong. This leaves little room for the Louisiana legislature, civilian scholars, or even a preponderance of intermediate state courts properly applying civilian methodology, to correct a federal interpretation that is not true to the Code or statute.[61] In *FDIC v. Abraham*, a recent Fifth Circuit panel stated that once the Fifth Circuit has "*Erie* guessed" as to the meaning of a Louisiana Code article or statute, *stare decisis* means it will not change that interpretation absent a decision by the Louisiana Supreme Court or near unanimous decisions by the intermediate appellate courts that are "clearly contrary" to circuit precedent.[62] Applying this strict *stare decisis* rule without first ensuring that the precedent is in line with civilian methodology seems contrary both to Louisiana law and the spirit of the *Erie* doctrine.

IV. FACTUAL FINDINGS V. RULES OF LAW

Another civil law inspired difference that creates problems for a federal court seeking to determine the applicable Louisiana law is the power of Louisiana appellate judges to find facts *de novo* from the record when they believe the trial court's fact finding is manifestly erroneous.[63] This power, described by Professor Vernon Palmer as a "vestige of the pre-purchase Civilian procedural system," has no counterpart in a federal system, where appellate review of jury findings of fact in particular is strictly limited by the Seventh

60. *Id.*

61. For a discussion on the limitations *stare decisis* places on a federal court's attempt to *Erie* guess at state law, see Jed I. Bergman, Note, *Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law*, 96 Colum. L. Rev. 969 (1996).

62. 137 F.3d 264, 269 (5th Cir. 1998) (quoting Pruitt v. Levi Strauss & Co., 932 F.2d 458, 465 (5th Cir. 1991)).

63. This power stems from Louisiana Constitution article V, § 10(B): "[A]ppellate jurisdiction of a court of appeal extends to law and facts." La. Const. art. V, § 10. Louisiana courts have limited appellate *de novo* review of facts to cases where the trial court's finding of fact is in manifest error or based on a reversible error of law. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989).

Amendment.[64] Not surprisingly then, some federal judges have struggled in determining how to use state court appellate findings of fact when applying Louisiana law.

The Fifth Circuit confronted this problem as far back as 1952 in *Wright v. Paramount-Richards Theatres*.[65] There the plaintiff received a $16,000 jury verdict in a Louisiana slip-and-fall case in federal court by diversity jurisdiction.[66] The district court granted the defendant's judgment as a matter of law, citing a Louisiana state trial court's decision involving an almost identical accident in the same theater.[67] A Fifth Circuit panel reversed, reinstating the jury verdict.[68] That panel explained that a federal court in a jury trial case applying Louisiana law is bound by state court legal determinations, but not by state court findings of fact.[69] As a mixed jurisdiction, Louisiana allows its appellate judges, upon finding manifest error, to reweigh facts found by the jury, but the Seventh Amendment prevents federal judges from doing the same.[70] Therefore, the panel explained, the challenge for a federal court applying Louisiana law is to separate state court interpretations of law, applicable in the federal courts, and state court fact findings that cannot be used by a federal appellate court to expand its constitutionally limited review of jury verdicts.[71]

While this rule may seem straightforward, it is one that some reputable lawyers recently appearing before the Fifth Circuit failed to take into account. In *Ellis v. Weasler Engineering*, the plaintiff, a farm worker, sued the manufacturer of a pecan harvester for injuries suffered when his clothing got caught on the drive shaft between a tractor and the harvester.[72] Plaintiff received a substantial jury verdict in the district court, and defendants appealed. At issue in the case was whether there was sufficient evidence for a jury to find that the plaintiff had been engaged in a reasonably anticipated use of the product when his coat was caught by the whirling drive shaft as he was inspecting the harvester for a malfunction.

Applying *Wright* in this instance should have been fairly easy. As the *Wright* panel had recognized, a federal appellate court is not bound by state court findings of fact, and its substitution of such findings for those made by a jury transgresses the Seventh

64. Palmer & Sheynes, *supra* note 8, at 276.
65. 198 F.2d 303 (5th Cir. 1952).
66. *Id.* at 304.
67. *Id.* at 304-05.
68. *Id.* at 308.
69. *Id.* at 305-06.
70. *Id.*
71. *Wright*, 198 F.2d at 306.
72. 258 F.3d 326, 328 (5th Cir. 2001).

Amendment.[73] Yet rather than arguing about whether the evidence offered at trial was sufficient for a jury to find that the plaintiff had been engaged in a reasonably anticipated use of the product, lawyers for both sides argued by analogy to scores of Louisiana appellate opinions containing factual findings that particular situations did or did not amount to a reasonably anticipated use of the product. They argued for and against judgment as a matter of law on the basis of how similar or dissimilar the state court fact findings were to the facts of the case at bar.

These arguments were not faithful to the role accorded appellate review of facts in either system. As I noted above, while Louisiana courts are empowered to review findings of fact *de novo*, this power can be exercised only where the fact finder's determination was in manifest error. As a consequence, even Louisiana courts recognize that cases with identical facts can have different results given the latitude to be afforded the trier of fact as arbiter of reasonableness and witness credibility.[74] But brought to the federal system, the attorneys' arguments were even more egregious. A federal appellate judge is not empowered to reverse a jury verdict simply because he would have made a different finding of fact based on the evidence in front of him, or even because he believes a Louisiana state judge or jury would have reached a different result on those facts.

In the original opinion of *Ellis v. Weasler Engineering*, the court explained in depth the error of arguments based on state court factual findings to reverse the findings of a federal jury.[75] We noted that unlike rules of state law, which a federal court must apply in a diversity case, state court findings of fact are not binding upon the federal court.[76] The reason is that such factual determinations are in the province of the jury. After the opinion was issued, however, two non-Louisiana panel members became confused as to the meaning of the court's precedent in *Wright v. Paramount Richards Theatres* and, without changing the result, withdrew their endorsement of the original opinion's explanation and application of *Wright* and its underlying principles.[77]

I believe the two panel members' confusion reflects one difficulty a federal court has in ascertaining and applying Louisiana law. The mandate of *Erie*, which requires a federal court to act as the highest state court would act, is harder to follow because the Louisiana appellate opinions abound with factual findings and reviews of

73. *Id.* at 333.
74. Knighten v. Am. Auto Ins. Co., 121 So. 2d 344, 349 (La. App. 1st Cir. 1960).
75. 258 F.3d at 334-37.
76. *Ellis*, 258 F.3d at 334-36.
77. Ellis v. Weasler Eng'g, Inc., 274 F.3d 881 (5th Cir. 2001) (per curiam).

factual findings that must be carefully distinguished from rules of law or decisions. A non-Louisiana federal judge, used to appellate opinions containing less fact review and none *de novo*, can be easily misled when reading a Louisiana opinion to believe that a finding of fact in that opinion is a legal rule binding on subsequent Louisiana courts. Such a reading is not only unfaithful to Louisiana jurisprudence, which recognizes that different fact finders may resolve factually identical disputes in different but reasonable ways, but threatens to undermine parties' right to a federal jury trial and findings as to factual issues.

V. CONCLUSION

This catalog of the problems facing state and federal judges attempting to apply Louisiana law should not be taken as exhaustive or a negative comment on our system. I agree with Professor Symeonides that there is nothing wrong with Louisiana being a mixed jurisdiction.[78] In fact, I agree with my late great colleague Albert Tate that Louisiana has a great system that judges should revere.[79] But if we judges and civil law scholars are concerned about federal judges, as well as state judges, properly applying civil law methodology to the cases before them, the onus may be on us to exert greater efforts to educate judges on the civil law. One way of doing this would be for the Society of Louisiana Civil Law Scholars to take the lead in organizing courses for Louisiana judges on opinion writing using civilian methodology.

Why focus on judges when the failure to accurately apply civilian methodology extends to lawyers generally? Well, as Judge Richard Posner of the Seventh Circuit noted in a different context, lawyers take their cues, good and bad, from judges.[80] If lawyers' briefs are pedestrian, it may be because judges' opinions are lacking. Judges exhibiting a knowledge and interest in civil law methodology in their opinions will encourage lawyers to attempt to use the same in their briefs.

I do not think the task is hopeless. I am encouraged by the story of Edward Livingston, the common law trained lawyer who became convinced of the superiority of the civil law, and in time grew to be the strongest proponent of the civilian system in the critical period immediately following the Purchase.[81] From Livingston, we know

78. Symeonides, *supra* note 11, at 89.

79. *See* Albert Tate, Jr., *The Role of the Judge in Mixed Jurisdictions: The Louisiana Experience*, 20 Loy. L. Rev. 231, 231 (1974).

80. Richard A. Posner, *Legal Writing Today*, *in* The Scribes Journal of Legal Writing 35 (Joseph Kimble ed., 2001).

81. Richard H. Kilbourne, Jr., A History of the Louisiana Civil Code 43 (1987).

that common law trained lawyers and judges can become well-versed and respectful of civil law tradition. Our concern now is to ensure that they be given the knowledge and incentives necessary to do so.